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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5241

JACK THUGUT,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
THE QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	3
CONCLUSION	7

APPENDIX:

A—Opinion of the Superior Court of New Jersey, Appellate Division	1a
B—Order of New Jersey Supreme Court Denying Certification	8a
C—Judgment of New Jersey Superior Court, Law Division, Middlesex County	10a
D—Affidavit of Morris Spritzer in Support of Motion	12a

Cases Cited

Ashe v. Swenson, 90 S. Ct. 1189 (1970)	2
U. S. v. Spock, 416 F. 2d 165 (C. Ct. of A. First Circuit 1969)	2

United States Constitution Cited

Fifth Amendment	3
Sixth Amendment	3
Fourteenth Amendment	3

PAGE

Statutes Cited

N.J.S. 2A:112-3 ..... 4, 5

N.J.S. 2A:121-3 4

28 U.S.C. Sec. 1257(3) 2

Rule Cited

Rule 19-1(a) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JACK THUGUT,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petitioner prays that a Writ of Certiorari issue to review the judgment of the New Jersey Superior Court, Middlesex County, Law Division, and the order of the New Jersey Supreme Court denying certification.

Opinion Below

The Judgment of Conviction of the Petitioner in the Law Division of the Superior Court of New Jersey, and

the Opinion of the Superior Court of New Jersey, Appellate Division, affirming said Judgment of Conviction, sought to be reviewed, are set forth in the Appendix to this Petition. Application for Certification to the New Jersey Supreme Court was denied on July 7, 1971.

Jurisdiction

The jurisdiction of this Court to review this case by Petition for Writ of Certiorari is based upon 28 U.S.C., Sect. 1257 (3) and Rule 19-1(a).

The Questions Presented

1. In the light of this Court's decision in *Ashe* v. *Swenson,* 9 S. Ct. 1189 (1970) and *Sealfon* v. *U. S.,* 68 S. Ct. 237, in which the doctrine of double jeopardy was extended to include collateral estoppel, the use of the identical evidence used in the first trial for "bookmaking" which resulted in an acquittal was barred in the second trial for "lottery".

2. The Petitioner was denied a fair jury trial and due process in the light of the decision by the First Circuit Court of Appeals in *U. S.* v. *Spock,* 416 F. 2d 165 (1969) by reason of the mandatory language used by the Trial Court in its charge to the jury. Petitioner was further denied a fair jury trial and due process by the use of different language by the Trial Court in its charge with respect to conviction on the one hand, and acquittal on the other hand. See Appendix A page 3a *infra.*

Constitutional Provisions

Constitution: Amendment V.

To the extent here pertinent, the Fifth Amendment provides: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *".

Constitution: Amendment VI.

To the extent here pertinent, the Sixth Amendment provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *".

Constitution: Amendment XIV.

To the extent here pertinent, the Fourteenth Amendment provides: "* * * nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

In reliance upon a Search Warrant a team of police officers consisting of State Troopers and members of the Perth Amboy Police Department on August 13, 1968 entered and conducted a search of premises located at 202 New Brunswick Avenue, Perth Amboy. The premises, quoting from the Search Warrant, consisted of "the corner store of a 3 story red brick building, 2 plate glass windows with the doorway between face on New Brunswick Avenue, one plate glass window faces on New Street". The interior of the main store premises was divided into a front section and a rear section by a

wall or partition in which was a doorway permitting access between the two sections. Running across a large part of the front section was a counter typical of the sort used in the dry cleaning business. In the rear section there was a desk and chair, a number of racks of the sort used for hanging clothes, and various pieces of mechanical equipment for cleaning and pressing clothes. At the extreme rear of the rear section was a door containing three separate locks leading to what was described as a "closet" but which was in fact a stairway to the basement at the top of which was a platform several feet wide. The basement itself was for the common use of all of the tenants of the building.

The only occupant of said store premises when the police entered was the defendant. Thugut, who was seated at the desk in the rear section talking on the telephone. He was immediately, and before any search was conducted, placed under arrest. The police remained in the store premises for approximately two hours during which they conducted a search.

Among the items confiscated by the police during the search was a brown paper bag containing a variety of pieces of paper alleged to be records of both horse-race bets and lottery number bets, and a cigar box likewise containing a variety of pieces of paper alleged to be records of both horse-race bets and lottery number bets. In many instances an individual sheet of paper contained both alleged horse-race bets and alleged lottery number bets.

As an aftermath of said search and seizure two separate indictments, one for bookmaking (N.J.S.A. 2A:112-3) and the other for possession of lottery paraphernalia (N.J.S.A. 2A:121-3) were presented by the grand jury

against Thugut. Trial of the bookmaking charge was held first and resulted in an acquittal. At the trial of the bookmaking case (N.J.S.A. 2A:112-3) no direct evidence whatsoever was presented by the State of the acceptance of bets, and the State relied exclusively on the circumstantial effect of "possession" or in any event "constructive possession" of the paper data above referred to. This aspect was fortified by the State's summation asserting reliance upon "circumstantial evidence", that is to say, that "possession" permitted the inference of engaging in bookmaking. The Court charged the effect of circumstantial evidence.

When, some months later, trial on the lottery charge was moved, the defendant moved for dismissal on the grounds of *res judicata* and collateral estoppel, among other things, which motion was denied.

At the first trial for bookmaking the portion of the contents of the same brown paper bag and of the contents of the same cigar box which contained separate alleged entries of bookmaking were offered in evidence. In addition, with respect to the sheets of paper containing alleged entries of both bookmaking and lottery, the lottery evidence was covered up and the sheets of paper were then photocopied, and the photocopies were then offered in evidence.

In this second trial, which was upon the indictment charging Thugut with possession of lottery paraphernalia, Thugut was convicted. The portion of the contents of the same brown paper bag and of the contents of the same cigar box which contained alleged entries of lottery were offered in evidence by the State over the objection of defense counsel.

Defense counsel argued that possession of the brown paper bag and of the cigar box necessarily included all of the contents and that the issue of possession of the brown paper bag and the cigar box had been once adjudicated by a jury adverse to the State in the first bookmaking trial.

The constitutional issue of a fair trial was also raised by reason of the Court's charge to the jury in which the Court, among other things said

> "Your responsibility then is to consider and weigh the evidence in this case and if you come to the conclusion that the State has proved the charge against the defendant beyond a reasonable doubt, then you will convict him of the charge.
>
> In other words, you will return a verdict of guilty. On the other hand, if you come to the conclusion with respect to the charge that, or any element of the charge, that the State has failed to prove the element or the whole charge beyond a reasonable doubt, then it is your responsibility to acquit him, that is to say, to return a verdict of not guilty."

Defense counsel argued two objections to this portion of the charge: (1) The language "you will convict him of the charge" was in effect a command and an impermissible intrusion into the exclusive province of a jury, and (2) there was an invidious difference between the language used with respect to conviction and acquittal when the Court said "it is your responsibility to acquit him". The Court refused the request of defense counsel to use equal language with respect to both conviction and acquittal and in any event to avoid the use of "you will". The defendant was convicted and was sentenced to a term of two to three years in the New Jersey State Prison where he is now confined.

This appeal is from that conviction. In due course an appeal was taken to the Superior Court of New Jersey —Appellate Division in which the judgment of conviction was affirmed. The opinion of Judge Matthews has been set forth above. Thereafter application was made to the New Jersey Supreme Court for certification, which was denied.

CONCLUSION

For the foregoing reasons, the judgment of conviction of the Superior Court of New Jersey, Law Division, Middlesex County, and of the Superior Court of New Jersey, Appellate Division, affirming said conviction, and the order of the New Jersey Supreme Court denying certification were erroneous and a writ of certiorari to review the same should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION—A-1557-69

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JACK HEINZ THUGUT,

Defendant-Appellant.

Argued February 2, 1971—Decided May 4, 1971.

Before Judges LEWIS, MATTHEWS and MINTZ.

On appeal from the Middlesex County Court.

Mr. Morris Spritzer argued the cause for appellant.

Mr. John H. Stockel, Special Deputy Attorney General, argued the cause for respondent (*Mr. Clinton E. Cronin,* Acting Prosecutor of Middlesex County, attorney).

The opinion of the court was delivered by
MATTHEWS, J.A.D.

Appendix A

Defendant appeals from a judgment of conviction for possession of lottery slips, contrary to N.J.S.A. 2A:121-3. Originally, defendant was charged in three separate indictments, all of which arose out of a "single" raid. The first indictment charged him with bookmaking, in violation of N.J.S.A. 2A:112-3. He was tried to a jury for this indictment and was acquitted on December 11, 1969. The second indictment, charging defendant with the crime involved on this appeal, was tried to a jury on February 23-25, 1970. That trial resulted in a guilty verdict. A third indictment, involving the possession of pornographic material, has not been moved for trial and is not involved in this appeal.

Prior to the first trial on the bookmaking charge, defendant brought a motion to suppress the evidence which was seized from his dry cleaning establishment pursuant to a search warrant. The issuance of that warrant was attacked in a motion on the ground that it was issued on facts insufficient to constitute probable cause. That attack is renewed on this appeal. We find this argument to be without merit.

The affidavit presented to the judge who issued the warrant stated that a "reliable informant" who had given information which led to arrests and convictions for gambling in the past had given information to the police that "male negroes were delivering lottery numbers and money to Jack Thugut at Thuguts Cleaners, 202 New Brunswick Avenue, Perth Amboy, New Jersey, between the hours of 1:00 PM and 4:00 PM." The affidavit then went on to report the representations of surveillance by the police which verified the fact that negro males were coming in and out of Thuguts Cleaners within the time period in

question and without having in their possession any clothing either on entry or exit.

While the affidavit fails to state how the informer received his knowledge of Thugut's activities, see *Spinelli* v. *United States,* 393 U. S. 410 (1969), there is more than sufficient information contained in the affidavit, based on the officers' surveillance, to have justified the issuance of the warrant. In addition, Detective Peters testified that he personally overheard someone say that he wished to place a bet with Thugut.

Defendant next argues that the trial judge in effect commanded the jury to return a guilty verdict against him in the following portion of his charge:

> Your responsibility then is to consider and weigh the evidence in this case and if you come to the conclusion that the State has proved the charge against the defendant beyond a reasonable doubt, then you will convict him of the charge.
>
> In other words, you will return a verdict of guilty. On the other hand, if you come to the conclusion with respect to the charge that, or any element of the charge, that the State has failed to prove the element or the whole charge beyond a reasonable doubt, then it is your responsibility to acquit him, that is to say, to return a verdict of not guilty.

We repeat defendant's argument with respect to this portion of the charge from his brief:

> Intrusion into the exclusive province of the jury cannot be sanctified by frequent trespasses which

> may have escaped appellate scrutiny for one reason or another. Juries should not be told under any circumstances that they "will" convict. It is an unmistakable command from the Bench which, regardless of anything else in the charge, they are most apt to obey. Such a command taints the charge beyond redemption.

Defendant's argument deals with the often-discussed but non-existent privilege of a jury to return a verdict of not guilty even though the evidence establishes guilt of an individual beyond a reasonable doubt. The question of the existence or non-existence of this so-called privilege was argued vigorously in academic circles during the trial of Dr. Spock. *United States* v. *Spock,* 146 F. 2d 165 (1 Cir. 1969).

Without attempting to get involved in natural, supernatural, moral, or super-moral law concepts, it seems to us that the role of the jury claimed by defendant here is not the current theory in this State or any of the United States. Pragmatically, we suppose, if a jury disagrees on "moral" grounds with the law as stated by the judge, or as it has been enacted by the Legislature, jurors will return verdicts of "not guilty" regardless of a judge's instructions. Whether this is to be regarded as a "right" of the jurors concerned under such circumstances, we leave to the theologians and philosophers. It is wrong.

Defendant cites to us in support of his view, *State* v. *Connelly,* 5 N. J. Misc. 393, 136 A. 603 (Sup. Ct. 1927). There, the following charge was objected to:

> If you are satisfied, gentlemen of the jury, that the state's witnesses are telling the truth, then the

> defendant is guilty. Of course, you have to give the alibi some consideration. Alibi is a word meaning "elsewhere." Now, if the defendant was elsewhere and you believe his witnesses there is nothing for you to do but return a verdict of not guilty. But if you believe the witnesses of the state, if you believe the officers and want to give consideration to his statement and the circumstances under which it was obtained and you are satisfied beyond a reasonable doubt that the state's witnesses have told the truth, there is nothing for you to do but return a verdict of guilty.

We are not informed by the court what the "apparent" errors of this charge were. It seems rather obvious, however, that the statement, "[o]f course, you have to give the alibi some consideration" was a clear invasion into the province of the jury by the judge. *Connelly* certainly does not stand for the principles advanced here by defendant.

We do not find that the instruction complained of amounted to a directed verdict of guilt. The charge considered in its entirety informed the jury in reasonably clear terms as to their duties as triers of the facts.

Defendant also argues that his prosecution for possession of lottery slips should have been barred by principles of collateral estoppel in view of his prior acquittal on the bookmaking charge. See *Ashe* v. *Swenson,* 397 U. S. 436, 25 L. Ed. 2d 469 (1970). We find no merit to this argument. Defendant was first acquitted of the crime of bookmaking—an activity distinct from the crime of possession of lottery slips. One need not possess lot-

tery slips in order to be guilty of bookmaking. One need not make book in order to be guilty of possession of lottery slips. It is irrelevant that both activities involve gambling, since the Legislature has made acts committed in the pursuit of each of these forms of gambling separate crimes.

Finally, defendant contends that the trial judge erred in denying his request for further clarification of that portion of his instructions to the jury which dealt with the "lack of evidence" rule.

Defendant notes first that the trial judge made brief mention of the fact that reasonable doubt may be generated by the State's failure to produce sufficient evidence. In another portion of the charge, defendant notes, the trial judge discussed circumstantial evidence at great length, stating at one point, that circumstantial evidence may often be stronger than direct evidence. At the conclusion of the charge, defendant asked the judge to explain to the jury that reasonable doubt may arise from a lack of circumstantial evidence as well as through gaps in direct evidence. Defendant believed it was crucial that the jury be so instructed because of the importance of circumstantial evidence in the case.

Frankly, we view defendant's argument under this point as an exercise in semantics. A supplemental charge as requested by defendant might have been of some solace to a logician, but we have grave doubt as to whether it would have aided the jury in any manner whatsoever. In any event, we find no error. We believe that a fair reading of the judge's charge made it crystal clear that reasonable doubt might arise in the minds of the jurors from

a lack of evidence whether direct or circumstantial. We believe that the requested supplemental charge would have served only to confuse.

The judgment of conviction is affirmed.

APPENDIX B

Order of New Jersey Supreme Court Denying Certification

SUPREME COURT OF NEW JERSEY

C-536 SEPTEMBER TERM 1970

ON PETITION FOR CERTIFICATION

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JACK HEINZ THUGUT,

Defendant-Petitioner.

To Appellate Divison, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

Appendix B

Filed:

July 7, 1971

JOHN H. GILDEA
Clerk

IRVING B. ZACHNER
Acting Clerk of the Supreme Court

APPENDIX C

Judgment of New Jersey Superior Court, Law Division, Middlesex County

(Filed—May 4, 1970.)

At a Session of the County Court, holden at New Brunswick in and for the County of Middlesex, of the term of September 1969—May 1970 Session.

HON. CHARLES M. MORRIS, JR.,
Judge, County Court

THE STATE,

vs.

JACK HEINZ THUGUT

Sur. I.359-68 for Possession of Lottery

Dated May 4, 1970

On motion of the County Prosecutor, the Court orders the Sheriff to set the Prisoner to the Bar to receive his sentence; he being accordingly set to the Bar, the Court doth thereupon order and adjudge that the Prisoner Jack Heinz Thugut having been convicted of the crime of possession of lottery be imprisoned in the State Prison of this State, for a minimum term of two (2) years, and for a maximum term of three (3) years, at hard labor upon this conviction. The defendant is to receive credit for the time incarcerated for one day. Defendant is hereby fined the amount of $1000.00.

Appendix C

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX, } ss.:

I, FRANK SCHATZMAN, Clerk of the County Court in and for the County of Middlesex, aforesaid, do hereby certify that the foregoing is a true copy from the records of said Court, of the sentence of Jack Heinz Thugut above named.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Seal of said Court, at New Brunswick, in said County, the 4th day of May in the year of our Lord one thousand nine hundred and seventy.

FRANK SCHATZMAN
Clerk.

[SEAL]

APPENDIX D

Affidavit of Morris Spritzer in Support of Motion

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX, } ss.:

MORRIS SPRITZER, being duly sworn, says:

1. I am a member of the firm of Spritzer & Spritzer, with offices at 75 Paterson Street, New Brunswick, New Jersey, and the person in charge of the above entitled case.

2. The Statement of the Case is hereby incorporated herein.

3. The Trial Court's charge to the jury in this case was, in fact, substantially similar to the Trial Court's charge in U. S. v. Spock, 416 F. 2d 165 (C. Ct. of A., First Circuit 1969) and was in fact a command to convict if the jury made certain fact conclusions. Apparently the U. S. Attorney General determined not to appeal *Spock* and as a result, the basic constitutional issue as to the extent a trial judge can intrude upon the function of a jury under the particular circumstances involved here, has not yet reached the U. S. Supreme Court. A decision on this critical and important issue is needed to establish guide lines to correct trial procedure in our State Courts, for the reason that State Courts may not deem a decision by a U. S. Circuit Court of Appeals to be mandatory.

4. It is quite apparent from the decision of Judge Matthews in the Appellate Division of the Superior Court of

Appendix D

New Jersey that the Appellate Division misconceived the principle of collateral estoppel. The inescapable inference to be drawn from the Appellate Division opinion is that collateral estoppel does not obtain where the crimes are different, even though the evidence in both cases is the same. The practical effect of this misconception is to nullify the doctrine of collateral estoppel. If the crime was the same in the second trial as in the first trial the traditional doctrine of double jeopardy would always apply, and the basic philosophy for extending the doctrine of double jeopardy by adding the doctrine of collateral estoppel is for the very purpose of treating a different crime based essentially upon the same evidence, which evidence was once heard by a jury and rejected.

MORRIS SPRITZER
Morris Spritzer

Sworn and subscribed to
before me this 4th day of
October 1971.

EVA M. MARTIN
Eva M. Martin
Notary Public of New Jersey
My Commission expires Jan. 30, 1974

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In The

Supreme Court of the United States

October Term, 1971

Docket No. 71-524

JACK HEINZ THUGUT,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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INDEX TO BRIEF

Page

Counter-Statement Concerning Jurisdiction . . 2

Statement of Facts and Procedural History . . 3

Statement of Questions Presented 5

Argument:

Point I 5

Point II 7

Point III 8

Conclusion 10

Table of Citations

CASES CITED:

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.ed. 469 (1970) 5, 6

United States v. Spock, 416 F.2d 165 (1st Cir. 1969) 9

Statutes Cited:

N.J.S. 2A:112-3 4

N.J.S. 2A121-3 4

28 U.S.C. Sec. 1257 (3) 2

Index

Page

APPENDIX

Indictment No. 358-68 — Bookmaking . . . 1a

Indictment No. 359-69 — Possession of Lottery Paraphernalia 2a

In The

Supreme Court of the United States

October Term, 1971

Docket No.

JACK HEINZ THUGUT,

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vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Index

Page

APPENDIX

Indictment No. 358-68 — Bookmaking . . . 1a

Indictment No. 359-69 — Possession of Lottery Paraphernalia 2a

In The

Supreme Court of the United States

October Term, 1971

Docket No.

JACK HEINZ THUGUT,

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STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the State of New Jersey, answering the Petitioner's Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, respectfully shows:

Indictments 358-68 and 359-68, returned by the Middlesex County, New Jersey Grand Jury, charging the petitioner with Bookmaking and Possession of Lottery Paraphernalia, respectively, in Appendix A, attached hereto.

Judgment of the New Jersey Superior Court, Law Division, Middlesex County, sentencing the petitioner after conviction under Indictment 259-68 for Possession of Lottery Paraphernalia, printed in Appendix C, attached to petitioner's brief.

The Opinion of the Superior Court of New Jersey, Appellate Division, affirming the judgment of conviction, printed in Appendix A, attached to petitioner's brief.

The Order of the New Jersey Supreme Court denying certification, printed in Appendix B, attached to petitioner's brief.

Counter-Statement Concerning Jurisdiction

The State concedes that if this Court has jurisdiction it must be invoked and authorized by 28 U.S.C., Sec. 1257(3).

We respectfully submit, however, that no title right, privilege or immunity, was determined below, in the Appellate Division of the Superior Court of New Jersey, nor did it decide any federal question of substance not heretofore determined by this Court, or contrary to the applicable decisions of this Court.

We respectfully submit that the decision below (the opinion of the Appellate Division of the Superior Court), is in conformity with the provisions of the Federal Constitution respecting fair trial and due process of law as guaranteed by the United States Constitution, and presents no departure from the applicable decisions of the Court below.

Statement of Facts and Procedural History

After a period of surveillance of the premises known as Thugut Cleaners, located at 202 New Brunswick Avenue, Perth Amboy, New Jersey and with the aid of information supplied by a confidential informant, a search warrant was obtained and on August 13, 1968 a search was conducted of the person of Jack Thugut, petitioner, and of the premises described above. Among the evidence recovered by the New Jersey State Police, who conducted the raid, were slips of paper recording lottery number bets found on the desk at which petitioner was sitting when they entered, a brown paper bag containing slips of paper recording both horse race bets and lottery number bets, and a cigar box containing the slips of paper recording both horse race bets and lottery number bets. Moreover, during the search, one Charlotte Nagy

entered the premises, asked for "Jack", handed to one of the officers an envelope containing several slips of paper recording lottery number bets and requested that it be given to "Jack".

On January 17, 1969 a Middlesex County Grand Jury returned separate indictments against the petitioner, for Bookmaking, in violation of N.J.S. 2A:112-3 and for Possession of Lottery Paraphernalia, in violation of N.J.S. 2A:121-3.

The petitioner was tried on the Bookmaking indictment on December 8, 9, 10, 11, 1969. The state troopers testified generally to the fact of the search, the discovery of bookmaking paraphernalia and to the interception of telephone calls relating to bookmaking during the course of the search. The jury returned a verdict of acquittal.

On February 5th and 6th, 1970 the defendant was tried on the indictment relating to Possession of Lottery Paraphernalia. The same state troopers testified generally to the fact of the search, the discovery of lottery slips, and the arrival on the scene of Charlotte Nagy who left an envelope containing lottery slips for the petitioner. The jury returned a guilty verdict, whereupon, the petitioner appealed.

The New Jersey Superior Court, Appellate Division, affirmed the judgment of conviction, and certification to the New Jersey Supreme Court was denied on July 7, 1971.

Statement of Questions Presented

Whether the defendant's acquittal on the charge of Bookmaking constitutes a valid and final judgment on an issue of ultimate fact which is an essential element of the charge of Possession of Lottery Paraphernalia.

Whether the slight change in the language used by the Court during its instructions to the jury, in its reference to the grounds for conviction as opposed to the grounds for acquittal effectively deprived the petitioner of his constitutional rights to a fair trial and to due process.

Whether a defendant's constitutional rights to a fair trial and to due process entitles him to instructions by the Court to the jury which give the jury the right to acquit the defendant in spite of their conclusion that the State has proven its case beyond a reasonable doubt.

Argument

Point I.

Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed.2d 469 (1970), cited by petitioner, is the most recent case on the subject of collateral estoppel, and it defines this extension of the principal of double jeopardy at page 443 as follows:

> "(Collateral estoppel) means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the parties in any future lawsuit"

and at page 444:

> "Where a previous judgment of acquittal was based upon a general verdict, the federal rule of collateral estoppel requires the court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and to conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

In the Ashe case, the crime involved was an armed robbery of six persons. The petitioner was tried for armed robbery of one of the victims and was acquitted. He was subsequently tried for armed robbery of another of the victims and convicted. The Supreme Court reversed on the grounds that "the single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers" (supra, at p. 445). The first jury found that he had not been. Therefore, the State was collaterally estopped from litigating the same issue in the second prosecution.

In the matter before the Court the essence of the first charge was the activity of making book. Because of the circumstances of the arrest, the identification of the defendant was never in issue. The only physical evidence presented to the jury was evidence directly related to bookmaking. In fact, as petitioner concedes in his brief (at p. 5), special care was taken to exclude from the first trial all evidence related to the lottery number bets. There was no issue of ultimate fact re-

solved by the first jury in favor of the petitioners, submitted to the second jury for reconsideration.

Point II.

Petitioner next challenges the language of the trial court in explaining the bases for verdict of conviction on the one hand or of acquittal on the other, as follows:

> "Your responsibility then is to consider and weigh the evidence in this case and if you come to the conclusion that the State has proved the charge against the defendant beyond a reasonable doubt, then you will convict him of the charge.
>
> In other words, you will return a verdict of guilty. On the other hand, if you come to the conclusion with respect to the charge that, or any element of the charge, that the State has failed to prove the element or the whole charge beyond a reasonable doubt, then it is your responsibility to acquit him, that is to say, to return a verdict of not guilty."

The respondent submits, without reference to authority, that this slight difference in language constitutes merely an attempt by the trial court to explain to the jury the alternative verdicts open to it, and that a fair reading of the overall language in this portion of the instructions conveys no "invidious" suggestion to the jury whatsoever.

Point III.

The final contention of the petitioner is that the jury has the right to acquit a defendant even if the prosecution has proven all the elements of the offense charged, beyond a reasonable doubt, and if a trial court instructs a jury otherwise it is reversible error. In response thereto, the respondent makes reference to and adopts a portion of the opinion of the Superior Court, Appellate Division, which is attached to the petitioner's brief at page 4a as follows:

> "Defendant's argument deals with the often-discussed but non-existent privilege of a jury to return a verdict of not guilty even though the evidence establishes guilt of an individual beyond a reasonable doubt. The question of the existence or non-existence of this so-called privilege was argued vigorously in academic circles during the trial of Dr. Spock. United States v. Spock, 416 F.2d 165 (1 Cir. 1969).
>
> Without attempting to get involved in natural, supernatural, moral, or super-moral law concepts, it seems to us that the role of the jury claimed by defendant here is not the current theory in this State or any of the United States. Pragmatically, we suppose, if a jury disagrees on 'moral' grounds with the law as stated by the judge, or as it has been enacted by the Legislature, jurors will return verdicts of 'not guilty' regardless of a judge's instructions. Whether this is to be regarded as a 'right' of the jurors

concerned under such circumstances, we leave to the theologians and philosophers. It is wrong."

The Spock case, cited by the petitioner (United States v. Spock, 416 F.2d 165, [1st Cir. 1969]), establishes nothing more than the principal that "to embark upon a practice of submitting special jury findings in a criminal case, along with the general issue, for no significant reason...." (at page 183), is reversible error. This can hardly be accepted as authority for the revolutionary argument advanced by the petitioner in this matter before the Court.

Conclusion

The respondent submits that the decision of the New Jersey Superior Court, Appellate Division, affirming the conviction, and the decision of the New Jersey Supreme Court denying certification are in full accord with the decisions of this Court.

The respondent submits further that no substantial federal question meriting review by this Court has been raised in this case.

For all the reasons set forth above, it is respectfully submitted that this petition of Jack Thugut for Writ of Certiorari be denied and dismissed.

Respectfully submitted,

JOHN S. KUHLTHAU
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Attorney for and of Counsel with Respondent, State of New Jersey
County Administration Building,
New Brunswick, New Jersey

THOMAS J. KAPSAK,
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Of Counsel and on the Brief
County Administration Building,
New Brunswick, New Jersey

APPENDIX A

Indictment No. 358-68 – Bookmaking

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION
(CRIMINAL)

No. 68-1167

THE STATE OF NEW JERSEY) Jan. 1969
Stated Session
vs.)

JACK HEINZ THUGUT,) September Term
1968
Defendant.)

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT JACK HEINZ THUGUT, between the 5th day of August, 1968 and the 13th day of August, 1968, in the City of Perth Amboy, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, wilfully and unlawfully did make and take what is commonly known as a book, upon the running of horses, mares and geldings, contrary to the provisions of N.J.S.

Indictment No. 358-68 – Bookmaking

2A:112-3, and against the peace of this State, the Government and dignity of the same.

A True Bill:

(Floyd W. Gaudet)
Foreman.
FLOYD W. GAUDET

(Edward J. Dolan)
County Prosecutor
EDWARD J. DOLAN

BY: (William D. Danberry)
Assistant Prosecutor

Indictment No. 359-68 – Possession of Lottery Paraphernalia

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION
(CRIMINAL)

No. 68-1168

THE STATE OF NEW JERSEY) Jan. 1969
Stated Session
vs.)
JACK HEINZ THUGUT,) September Term
1968
Defendant.)

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their

Indictment No. 359-69 – Possession of Lottery Paraphernalia

oaths, PRESENT THAT JACK HEINZ THUGUT, between the 5th day of August, 1968 and the 13th day of August, 1968, in the City of Perth Amboy, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, knowingly and unlawfully did possess divers papers, documents, slips and memoranda pertaining to the business of lottery and lottery policy, so called, contrary to the provisions of N.J.S. 2A:121-3, and against the peace of this State, the Government and dignity of the same.

A True Bill:

(Floyd W. Gaudet)
Foreman.
FLCYD W. GAUDET

(Edward J. Dolan)
County Prosecutor
EDWARD J. DOLAN

BY: (William D. Danberry)
Assistant Prosecutor